In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 433

P. S. SEYMOUR-HEATH, PETITIONER

v.

UNITED STATES OF AMERICA, AMERICAN PUMICE COMPANY, AND GEORGE T. GOGGIN, TRUSTEE IN BANKRUPTCY FOR TRANS-PACIFIC CORPORATION AND COMMUNICATIONS EQUIPMENT CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals denying recall of its mandate (Pet. App. 1), sought to be reviewed here, is not reported. The opinion of the court of appeals in the condemnation case from which the mandate issued (Pet. App. 2-3) is reported at 404 F.2d 336. An earlier relevant opinion of the court

of appeals (Pet. App. 4-16) is reported at 389 F.2d 327.

JURISDICTION

The order of the court of appeals was filed on May 8, 1969. The petition for a writ of certiorari was filed on August 5, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, who was on timely notice of his right to appeal a 1964 condemnation judgment and took no steps to that end, has been denied due process or other rights by the refusal of the Ninth Circuit to reopen the matter at this time.

STATEMENT

In 1944 and 1945 the United States instituted condemnation proceedings, which were consolidated, to acquire pumice mining claims on public lands in California, so that the area could be used for a Naval Ordnance Testing Station. These claims were held by the American Pumice Company.

A controversy arose in separate proceedings—involving the bankruptcy of related corporations which petitioner Heath controlled—whether petitioner or the trustee in bankruptcy, George T. Goggin, was entitled to the stock of American Pumice Company. This controversy was settled by a compromise which was approved by the referee in bankruptcy by an order dated October 20, 1959 (Pet. App. 4-8; 389 F.2d 328-330). That compromise provided that the

trustee, not petitioner, owns the stock of American Pumice Company; and that petitioner waives all interest in the condemnation actions or in the proceeds thereof, except that after all creditors and taxing authorities are first paid the trustee shall deliver the capital stock to petitioner. In addition, the compromise provided that petitioner shall select the chief counsel for the condemnation proceedings, that no compromise of those proceedings shall be made without approval of Goggin, petitioner and the referee in bankruptcy, and that:

> AMERICAN PUMICE CO. may appeal from any judgment or judgments rendered in said condemnation actions or move for a new trial or a different form of judgment, but need not do so unless first there shall have been adequate security furnished to it by the trustee or HEATH to provide for all cost, expense and liability of every kind which might be incurred with such procedure * * *.

Counsel designated by petitioner were retained and tried the condemnation case in the federal district court. They adduced valuations ranging from $910,000 to $1,359,000. The United States presented valuations from $19,600 to $21,200.[1] On November 24, 1964, the district court awarded $167,000, plus interest, as just compensation. Both the United States and American Pumice Company filed notices of appeal from the court's award. However, on July 30, 1965, following a conference attended by petitioner,

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[1] This conflicts with petitioner's statement (Pet. 11) that the lowest expert appraisal was $1,300,000.

the trustee, his counsel, the referee, and the attorneys who tried the case for the Company, the referee issued an order providing that there would be no appeal on behalf of the trustee and that (Pet. App. 7-9):

> If P. S. Seymour-Heath desires to proceed with an appeal from the award of the U. S. District Court, he may do so at his own expense and upon the posting of an acceptable surety bond in the amount of $225,000 with this court to protect these estates from any diminution from the award as it presently stands.

Petitioner did not post the bond or provide funds for an appeal, and the appeal of American Pumice therefore lapsed (Pet. App. 9).

Over petitioner's objections, but with the concurrence of the trustee, his counsel and counsel who tried the condemnation case, the referee then entered an order approving a compromise settlement of the United States' appeal. (Pet. App. 9-11). The district court denied a petition for review, adopting the findings and conclusions of the referee. The Ninth Circuit (with one dissent) reversed on January 10, 1968, stating (Pet. App. 4-16):

> We agree that the order of July 30, 1965, which is also final, governs the right of Heath to appeal, or to require American Pumice or the trustee to appeal. The requirements of that order not having been met, and the appeal having been dropped, the only pending appeal is that of the United States. But that does not necessarily

> mean that the trustee can compromise, while the appeal is pending, or after judgment, without Heath's written consent.

The compromise having thus fallen through, the United States prosecuted its appeal in the condemnation action. On November 15, 1968, the Ninth Circuit affirmed the award of the district court (Pet. App. 2-3; 404 F.2d 336).

On April 24, 1969, petitioner filed the present motion in the Ninth Circuit to recall the mandate and allow him to proceed with the appeal of the American Pumice Company or, alternatively, to allow him to proceed for relief in the district court in the nature of a bill of review. The Ninth Circuit denied the motion (Pet. App. 1). It is this action which he seeks to review.

ARGUMENT

No consideration warranting review by this Court is present. The decision of the court of appeals is correct. It does not conflict with any decision of this Court or of any other court. And it is of narrow significance because it turns on a peculiar factual context unlikely to recur.

Petitioner's right to appeal was protected from the beginning. The cause for his complaint here derives from his own inaction. His right to appeal was preserved by the consent order of October 20, 1959. His interest was further safeguarded by the timely filing of a protective notice of appeal by counsel of his designation from the 1964 condemnation judgment. He was advised again by the referee's order of July 30,

1965, that he could proceed with the appeal upon posting the security anticipated in the 1959 consent order. The requirement to post such security was reasonable in view of the risk, on a new trial, of losing much of the existing award (including a large sum of interest) due to the great disparity between the valuation figures of the parties. Finally, more than a year transpired after petitioner was advised by the Ninth Circuit on January 10, 1968, in a related appeal of his own, that the condemnation appeal of American Pumice had lapsed (Pet. App. 9, 13), before he filed the present motion, on April 22, 1969, based on that condemnation appeal.[2] Under these circumstances, we submit that petitioner has not been denied due process or any other right, legal or equitable.

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[2] In the interim, the appeal by the United States in the condemnation action was briefed, argued, and decided. After that appeal had been argued and 10 days before it was decided on November 15, 1968 (Pet. App. 2), petitioner moved for a remand for purposes of intervention. This was denied on November 13, 1968. No further action was taken on it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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